

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH COURT III

C.P. No. (IB) 577/MB/C-III/2022

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of

Jaatvedas Construction and Contractors LLP

Having office at:

1804, 18th Floor, the Ambience Court, Plot No. 02, Sector 19D, Vashi, Thane - 400070

...Operational Creditor/Petitioner

Versus

B.P. Gangar Construction Private Limited

Having office at:

33, 3rd Floor, Todi Building, Mathurdas Mill Compound, Lower Parel (West), Mumbai - 400013

...Corporate Debtor/Respondent

Order pronounced on: 06.03.2024

Coram:

Hon'ble Ms. Lakshmi Gurung, Member (Judicial)

Hon'ble Sh. Charanjeet Singh Gulati (Technical)

Appearances:

For the Operational Creditor: Adv. Prasannan Namboodiri

For the Corporate Debtor: Adv. Aniruth Purusothman

Per: Sh. Charanjeet Singh Gulati, Member (Technical)

1. This Petition has been filed by Jaatvedas Construction and Contractors LLP (“**Petitioner/ Operational Creditor**”) to initiate Corporate Insolvency Resolution Process (“**CIRP**”) against B. P. Gangar Construction Private Limited (“**Respondent/Corporate Debtor**”) under **Section 9** of the Insolvency and Bankruptcy Code, 2016 (“**the I&B Code**”) for an alleged default of **Rs. 1,74,59,185** along with applicable interest from due date of each invoice.
2. The Corporate Debtor is a private limited company incorporated under the Companies Act, 1956 having its registered office at Mumbai, Maharashtra. Therefore, this Bench has jurisdiction to deal with the present petition.
3. It is stated that in January 2021, the Operational Creditor and the Corporate Debtor entered into an understanding wherein the Corporate Debtor engaged the Operational Creditor to supply services in the nature of execution of contract work/ civil work for construction of a building under project named “Skye31” in Wadala, Mumbai – 400031.
4. From March 2021 to December 2021, the Operational Creditor raised 4 (four) invoices aggregating to Rs. 2,82,88,654 against the services rendered, and as per these invoices, the payments had to be made immediately. The Corporate Debtor made part payments but only till June 2021 and therefrom, the Corporate Debtor failed to pay the outstanding debt amount due and payable under Invoice No. JCCLLP/BPGCPL/RA No. 3 (**Invoice No. 3**) and JCCLLP/BPGCPL/RA no. 4 (**Invoice No. 4**).
5. The Operational Creditor sent an email dated 20.12.2021 notifying about the outstanding dues. The Corporate Debtor responded by sending an email dated 28.12.2021 admitting to pay the outstanding balance and

issued 4 cheques aggregating to Rs. 1,18,59,196 which returned back as dishonoured. Thereafter, two legal notices dated 29.01.2022 and 01.02.2022 were issued by the Operational Creditor under section 138 of Negotiable Instruments Act, 1881. On 17.03.2022, the Operational Creditor issued Form-4 Notice under section 8 of the I&B Code, however, despite notice, the Corporate Debtor failed to make payment. Hence, this petition has been filed for an amount due of Rs. 1,74,59,185.

6. Since the payment was to be made immediately as per the invoices, the date of default is stated as 01.07.2021 and 01.01.2022 for Invoices No. 3 & 4 respectively. As regards amount of interest, it is submitted that since Invoice No. 3 does not mention any rate of interest, the applicable interest rate shall be as prescribed under the MSMED Act, 2006 whereas the interest rate with respect to Invoice No. 4 is mentioned as 24% per annum in the Invoice itself.

Submissions of the Corporate Debtor

7. The Corporate Debtor is part of the TMGL Group (earlier known as Tattva Mittal Group), which is engaged in real estate development and construction. The TMGL Group entered into two identical Letters of Intent dated 12.10.2020 with Jaatvedas Construction Company Pvt. Ltd. (**JCCPL**) whereunder JCCPL was appointed as the construction contractor for two real estate projects namely 'Bombay XI' and 'Skye 31'.
8. Subsequently, the work began under the aegis of JCCPL's group entity Jaatvedas Construction and Contractors LLP (operational creditor/petitioner herein). As per the terms of the Letters of Intent, there was a 50:50 barter arrangement between the operational creditor and the corporate debtor whereunder the operational creditor undertook construction of the said projects and in exchange thereof, the Corporate Debtor had to give saleable area in the said projects to the Operational Creditor or part of the contract amount subject to the performance of obligations by the Petitioner.

9. It is submitted that there were several issues with the performances of the operational creditor like that of poor quality, gross delays and other irregularities and even failure to pay salary dues to its personnel and workers. The TMGL Group had to suffer huge losses on account of cost overruns due to delays, rent payable to tenants, redoing the poor work already done by the operational creditor, engagement of new contractors, etc. This led to disputes and differences between the parties and consequently, the arrangement between the Corporate Debtor and Operational Creditor was terminated in November 2021.
10. The Corporate Debtor submits that there are pre-existing disputes between the parties as is evident from the email communications dated 20.12.2021, 28.12.2021, 30.12.2021, 22.01.2022, 24.01.2022, 25.01.2022 and 31.01.2022. Copies of the email exchanges are annexed to the Reply.
11. In the email dated 28.12.2021, the Corporate Debtor stated that as per TMGL Group, the amount payable to the operational creditor by Corporate Debtor was Rs. 1 crore plus GST, which the TMGL Group was willing to pay and clear the full and final outstanding. However, the operational creditor did not accept the same and demanded Rs. 1,74,59,185 plus interest. However, as per the Corporate Debtor, the amount payable to the Petitioner for 'Skye 31' was only Rs. 1,18,59,186 inclusive of GST which has been paid in full through demand draft dated 20.02.2023.
12. It is further submitted that the claims of the Petitioner are self-contradictory. In the legal notice dated 29.01.2022, the Petitioner was claiming Rs. 2,82,88,655. However, subsequently, in the second legal notice dated 01.02.2022, the amount claimed by the Petitioner was Rs. 1,78,48,655. In the present Petition, the default amount stated is Rs. 1,74,59,185/-.

13. Moreover, the Petitioner had stopped work on the site from November 2021 and therefore, no bill could have accrued after November 2021, and the invoice/bill of Rs. 1,55,39,226.48 (i.e. the Invoice No.4) was issued only on 31.12.2021 which shows that the invoice/bill dated 31.12.2021 was issued as an afterthought with a view to inflate the claim.
14. In view of the above, the Corporate Debtor submits that the email communications establish, beyond reasonable doubt, several disputes and differences between the parties and therefore, in terms of sections 8(2)(a) and 9(5)(i)(d) of the I&B Code, the present Company Petition ought to be dismissed.
15. In addition to the above contentions, it is also submitted that the claim amount in the Petition was Rs. 1,74,59,185 whereas the undisputed amount of Rs. 1,18,59,186 has been paid by the Corporate Debtor as already mentioned. Accordingly, without prejudice, the present claim amount, even though disputed, is only Rs. 55,99,999 which is below the threshold limit of Rs. 1,00,00,000 as stated in section 4 of the I&B Code.
16. It is also contended that the Affidavit-in-support dated 15.04.2022 of the present Petition was unstamped and the applicable stamp duty was not paid at the at the time of execution and affirmation, and the stamp duty certificate affixed therewith is dated 26.04.2022. Therefore, the said Affidavit-in-support is not proper, and, on this ground, the Company Petition is defective.

Response of Operational Creditor

17. In response to the Corporate Debtor's Reply, the Operational Creditor filed an Additional Affidavit dated 31.08.2023 wherein it was submitted as follows:
 - i) The outstanding principal amount of Rs. 1,74,59,185 is duly reflected in the Ledger statement of the Corporate Debtor. Moreover, the Corporate Debtor had also admitted the liability of Rs. 1,74,59,185

and handed over 4(four) cheques dated 24.12.2021, 21.12.2021, 15.01.2022 and 31.12.2022 bearing amount of Rs. 50,00,000/-, Rs. 18,59,186/-, Rs. 50,00,000/-, and Rs. 50,00,000/- respectively, aggregating to Rs. 1,68,59,186 after TDS deduction of Rs. 5,99,999 from the principal amount claimed herein. However, all the four cheques were dishonoured.

- ii) The Corporate Debtor has relied upon an undated and unsigned MoU that was sought to be executed between the parties in or around January 2022. However, nothing contained in the MoU shall be relied upon or sought to be led in evidence as against the Operational Creditor, as it is not signed.
- iii) The Corporate Debtor is responsible for slow work progress as there was delay in payment of construction charges as well as approvals from architect and RCC Consultant was not submitted by the Corporate Debtor.
- iv) As regards threshold limit, it is submitted that the threshold limit at the time of filing of petition must be considered. The payment of Rs. 1.18 crore was just made to take the plea of threshold limit which if permitted, would defeat the very object of the code and would allow the Corporate Debtor to escape the clutches of the Code by making partial payments after the service of demand notice/filing of petition to bring debt below Rs. 1 crore.

FINDINGS/OBSERVATIONS

- 18. Heard the Counsels and perused the documents placed on record.
- 19. It is an admitted fact that the Operational Creditor and the Corporate Debtor entered into a Letter of Intent dated 12.10.2020 whereby the Operational Creditor rendered construction services for the project named 'Skye 31'. The construction work agreed upon between the parties

had commenced from January 2021 but was short-lived and came to an end in November 2021 due to disputes between the parties on grounds of quality of services and slow progress in work.

20. The operational creditor raised 4 invoices between March 2021 and December 2021 aggregating to an amount of Rs. 2,82,88,654.48/-. The part payments made by the Corporate Debtor so far have been adjusted towards the outstanding amount against the Invoices sequentially. Accordingly, the current outstanding liability is alleged to be Rs. 1,74,59,185 plus applicable interest.
21. The Corporate Debtor paid Rs. 1.04 crores until 06.11.2021 and thereafter, issued cheques aggregating to Rs. 1,18,59,186/-, which were dishonoured. Subsequently, the Operational Creditor registered a complaint under section 138 of the Negotiable Instruments Act, 1881 and issued two legal notices dated 29.01.2022 and 01.02.2022 calling upon the Corporate Debtor to make the outstanding payment of Rs. 1,74,59,185 plus applicable interest.
22. When the Corporate Debtor failed to pay the outstanding debt, a demand notice dated 17.03.2022 under section 8 of the I&B Code was issued by the Operational Creditor calling upon the Corporate Debtor to pay the outstanding amount of Rs. 1,74,59,185 plus the applicable interest. The Corporate Debtor failed to make the payment and hence this petition has been filed.
23. It is the case of the Corporate Debtor that there is a pre-existing dispute between the parties as there were deficiencies in the services rendered by the Operational Creditor. It is a trite law that the Adjudicatory Authority is obligated to dismiss a petition under section 9 of the I&B Code if it is clearly visible that there exists a pre-existing dispute between the parties, even if the petition is otherwise complete in all respect.

24. Thus, before going into the merits of the case, it is imperative for this Tribunal to adjudicate on the issue as to whether there is a pre-existing dispute between the parties. For this purpose, we shall refer to the trail of emails annexed by both the parties, relevant portions of which are reproduced below:

i) **Email dated 20.12.2021** addressed to Corporate Debtor by Operational Creditor:

*“As per our discussion on Friday on 17th December 2021 as regards to construction contract of Residential complex in name SKY 31 issued to us by B P Gangar Construction Pvt Ltd, it was discussed that **the construction work was to be stopped as there was performance issues as the construction work was progressing slowly**, which was basically due to long outstanding wherein your company was not releasing the payment as this outstanding was due for constructing Rehab Building which was to be paid immediately was pending since 4 to 5 months, also the necessary approval from Architect and RCC consultant was not submitted by your company for starting construction work of sale building, even after giving regular reminder, which has delayed the construction work, and it was concluded to stop the work.*

We request you to immediately release the payment towards our long outstanding bills immediately and obtain NOC to allot the work to other contractor.”

(Emphasis Provided)

ii) **Email dated 28.12.2021** addressed to Operational Creditor by Corporate Debtor in response to email dated 20.12.2021:

*“... You have been only able to deliver the structure work for the rehab building partially (17th to 23rd floor) and the Plaster work partially (1/2 portion of building and that too single Coat) in the last 11 months and in the sale building except for 33 Nos Pile Built up you have been unable to deliver anything. **In May 2021 when we had met to discuss the lack of progress, you had wanted us to excavate additional parts of the plot to be able to start construction without needing to stop again and had promised to deliver the Plinth within 3 months of the same.***

We had subsequently excavated the plot as required and had also commenced the Pile Built up and handed over

the area for you to start the Footing/Raft. Till date you were unable to commence any work whatsoever. To an extent we additionally completed the Soling and PCC from our side and also additional Plie Built up (21 Nos) in order to further facilitate you to start work.

You kept committing that you are ready and willing to complete the Plinth from your own self and we would need to pay you the bills for the same subsequent to you completing the Plinth. Unfortunately, there have been inordinate delays and complete lack of progress and we have been forced to look elsewhere to salvage the situation and commence work.

Your claim that the necessary plans and approvals were not submitted for the sale building is completely frivolous and false as we had all the necessary data and details handed over to you as early as June/July 2021. There was enough and more work for your team to start unabated work till Plinth which you never commenced.

With regards to your Bill, as discussed and settled we have a Net running bill due of Rs. 2.1 cr (From January to November 2021) of which we have already settled a running payment of Rs. 1.1 cr. We have committed to pay the net outstanding plus GST, without any reductions whatsoever and with a certain deadline and clear full and final outstanding.”

(Emphasis Provided)

iii) **Email dated 30.12.2021** addressed to Corporate Debtor by Operational Creditor:

“***

*3. Even though there is considerable delay in payment of our bills, we have continued with the construction activity inspite of **not being provided with the necessary approvals from Architect and RCC Consultant for which reminders were given to your Company officials from time to time.** It is mentioned in your mail dated 28.12.2021 that such approvals were provided to us during June/July 2021, which is totally devoid of any truth and hence we put your Company to strict proof thereof.*

*4. It can be observed from the contents of your mail dated 28.12.2021 itself that **there was no clear path for us to carry out the construction activity and hence the reason for the slow progress in the construction is solely attributable to your Company alone and not to us.***

*7. We would use this opportunity to sincerely advise your Company to **not to engage any other contractor for carrying out the construction work in our place without clearing our outstanding dues and obtaining NOC from us failing which we would be constrained to initiate such legal proceedings, both civil and criminal as are warranted by law.***

(Emphasis Provided)

25. From the plain reading of the aforesaid emails, it can be inferred that there is a dispute between the parties as to the quality of services as the Corporate Debtor had pointed out certain discrepancies and delay in the work executed by the Operational Creditor which allegations were objected by the Operational Creditor stating that the default is entirely due to the failure/fault on part of the Corporate Debtor.
26. Further, the Corporate Debtor also annexed certain email exchanges between Tattwa Mittal Pvt Ltd and the Operational Creditor dated 22.01.2022, 24.01,2022, 25.01.2022 and 31.01.2022 to show that there existed serious deficiencies in the conduct of the Operational Creditor with respect to both the projects assigned, because of which the TMGL Group had to suffer financial losses and whereby they were constrained to terminate the contract with the Operational Creditor. This makes it amply clear that there exists a dispute as regards the conduct of and the services provided by the Operational Creditor. A perusal of the correspondence between the parties as reproduced above reveals that the emails were exchanged before the issuance of the demand notice dated 17.03.2022 thereby corroborating the existence of pre-existing dispute.
27. However, for deciding the issue in its entirety, we are inclined to also consider the counter arguments of the Operational Creditor. It is submitted that there is no pre-existing dispute since the Corporate Debtor admitted its liability to pay to the Operational Creditor in its email dated 28.12.2021. In this regard, we are conscious of the fact that the Corporate Debtor had admitted the outstanding liability of Rs. 1 crore plus GST in its email dated 28.12.2021 for which purpose cheques were

also issued aggregating to Rs. 1,18,59,186 which were later dishonored and proceedings under section 138 of the Negotiable Instruments Act, 1881 was also initiated.

28. We note that the Operational Creditor has filed the instant petition on May 2022 claiming outstanding principal amount to be Rs. 1,74,59,185 which is inclusive of cheque amount of Rs. 1,18,59,186. The present petition was pending before this Tribunal while section 138 proceeding was also pursued parallely for recovery of cheque amount of Rs. 1,18,59,186 against which the Corporate Debtor made full payment vide demand draft dated 20.02.2023 which has led to the closure of the Section 138 Case No. 1326/2022.
29. Thus, in view thereof, the balance out of the amount claimed would reduce to Rs. 55,99,999 plus interest. There is no evidence placed on record which shows that the Corporate Debtor has unambiguously admitted its liability to pay this amount. The Corporate Debtor stated that the amount of Rs. 1,18,59,186, paid on 20.02.2023, is the admitted liability and there are no further dues. Also, the Corporate Debtor stressed on the inefficiency of the Operational Creditor in rendering services as already discussed above.
30. It is also a fact that the Operational Creditor had issued two legal notices dated 29.01.2022 and 01.02.2022 to the Corporate Debtor calling upon to make payment of Rs. 1,74,59,185 plus interest. It is noteworthy that these legal notices were issued prior to the issue of demand notice under section 8 of the I&B Code, which was on 17.03.2022.
31. From the foregoing, it is apparent that there is a pre-existing dispute regarding the quality of services which has led to disagreement in the outstanding amount. It is not for the Adjudicating Authority to hear the disputes between the parties and to decide as to the quantum of amount due to the Operational Creditor. Since in this, there exists pre-existing

dispute, the instant Petition is not maintainable under section 9(5)(ii)(d) of the I&B Code.

32. We rely on the judgment of the Hon'ble Supreme Court in the **Mobilox Innovations Private Limited v. Kirusa Software Private Limited [2018 (1) SCC 353]**:

*“40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5) (2) (d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. **The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.**”*

(Emphasis Provided)

33. We also rely on the judgment of Hon'ble NCLAT in **Karpara Project Engineering Private Limited vs. BGR Energy Systems Ltd [Company Appeal No. 622 of 2018]** wherein it was held as follows:

“7. ... It is the settled position of law that the existence of a pre-existing dispute is a bar to initiation of Corporate Insolvency Resolution Process at the instance of an Operational Creditor. The Adjudicating Authority is required to ascertain whether the Operational Creditor has received the notice of dispute pursuant to service of notice of demand on the Corporate Debtor within the specified time or a dispute emerges from the record of information utility. A suit or arbitration proceeding relating to a dispute may be

*pending between the parties or the dispute raised qua the claim or the invoices may emerge from the record of information utility or correspondence and communication between the parties. The Adjudicating Authority is not required to conduct a roving enquiry or examine the merits of dispute in a manner as if he were going to decide the issues on merit. The Adjudicating Authority exercises a limited jurisdiction and cannot dwell upon the pros and cons of the claim or merits of dispute. The limited exercise required to be undertaken by the Adjudicating Authority extends only to sift the material for separating the grain from the chaff with a view to reject a palpably spurious defense. Likelihood of such defense succeeding or failing is not the concern of Adjudicating Authority. **If the dispute exists in fact, is a pre-existing dispute and is not spurious, hypothetical or illusory, the Adjudicating Authority must reject the application.***

(Emphasis Provided)

34. Moreover, we also see that the initiation of insolvency proceedings in the instant case is likely to instigate ‘Recovery’ of dues of operational creditor and not ‘Resolution’ of the Corporate Debtor. The Hon’ble Supreme Court and the Hon’ble NCLAT, in a catena of decisions, have held that proceedings under the Code would not be utilized as a recovery mechanism.
35. The Hon’ble Supreme Court in **Transmission Corporation of Andhra Pradesh Limited vs. Equipment Conductors and cables Limited [(2019) 12 SCC 697]** following its earlier judgment in **Mobilox Innovations Private Limited v. Kirusa Software Private Limited [2018 (1) SCC 353]** observed as hereunder:
- “15. In a recent judgment of this Court in Mobilox Innovations Private Limited vs. Kirusa Software Private Limited, this Court has categorically laid down that IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked.”*
36. We also refer to the judgment of Hon’ble Supreme Court in **M/s S.S. Engineers & Ors. vs. Hindustan Petroleum Corporation Ltd [Civil Appeal No. 4583 of 2022]** wherein it was held as follows:

“31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for nonpayment of disputed dues claimed by an operational creditor.”

37. Thus, taking into consideration the facts and circumstances of the case, this Tribunal is of earnest view that this Petition is devoid of merit for the very reason that there is a pre-existing dispute which *prima facie* renders the petition as non-maintainable as held in **Mobilox Innovations Private Limited v. Kirusa Software Private Limited [2018 (1) SCC 353]** which serves as a *locus classicus* on the issue. In view of the same, we do not consider it prudent to delve into the other factual and legal issues arising out of the present case.
38. Accordingly, the present Company Petition is **dismissed**.

Sd/-

Charanjeet Singh Gulati
Member (Technical)

Sd/-

Lakshmi Gurung
Member (Judicial)

Uma, LRA